UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:18-cv-00319

DEFENDANT'S OPPOSTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY AND A STAY OF SUMMARY JUDGMENT BRIEFING

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INTRODUCTION

Plaintiff American Oversight submitted four Freedom of Information Act (FOIA) requests to the Department of Justice (DOJ), only one of which (the "Guidance FOIA") remains at issue in this case. DOJ filed a motion for summary judgment attesting to the fact that no records responsive to the Guidance FOIA were found. On the day that its brief responding to Plaintiff's cross-motion for summary judgment and replying to its own summary judgment motion was due, DOJ notified Plaintiff and the Court that it had identified an email record responsive to the Guidance FOIA. Because the record was not discovered in the initial search for records conducted by DOJ's Office of Information Policy (OIP), OIP undertook a supplemental search, including a search of email sent by senior officials in the Office of the Attorney General (OAG) and Office of the Deputy Attorney General (ODAG) to John Huber, the U.S. Attorney for the District of Utah whose evaluation of issues is the subject of Plaintiff's FOIA request. OIP had not previously done such an email search, relying instead on the recollection of the involved officials, and Plaintiff had specifically requested such a search in its opposition to the Department's motion for summary judgment. *See* Pl.'s MSJ, ECF No. 18-1, at 23–24. The supplemental search turned up no further records responsive to the Guidance FOIA, consistent with the Department's representation that details of Mr. Huber's direction were addressed orally in meetings and discussions among a small group of Department officials.

Despite the fact that the Department has now found a responsive record and done the very type of search Plaintiff requested, Plaintiff is not satisfied. Indeed, it did not even wait for the government to file this brief and describe its supplemental search in full before moving for discovery pursuant to Civil Rule 56(d), contending that it lacks facts to oppose summary judgment. The declaration accompanying this brief provides sufficient information about OIP's supplemental search, as well as about the late discovery of the responsive record, for Plaintiff to

lodge any arguments it likes in its summary judgment reply brief, and for the Court to determine that the government's search was adequate under FOIA. The mere fact that the conclusion that there were no responsive records turned out to be incorrect, where the government immediately notified Plaintiff and the Court of the found record and conducted a supplemental search to identify any other responsive records, does not justify discovery in this FOIA case. Because the government's search for records responsive to the Guidance FOIA was adequate, it is entitled to summary judgment.

BACKGROUND

In its opening brief, the Department defended its search for records responsive to the Guidance FOIA. Def.'s MSJ, ECF No. 16-1, at 6–13; *see also* Pl.'s MSJ, ECF No. 18-1, at 10. The Guidance FOIA sought "all guidance or directives provided to the 'senior federal prosecutors' who have been 'directed' 'to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters' . . . regarding their performance of that task." Def.'s MSJ at 4. Because U.S. Attorney for the District of Utah John Huber was the only such "senior federal prosecutor[]," the Guidance FOIA seeks all guidance or directives provided to him regarding his performance of the referenced evaluation.

The government's declaration explained that OIP worked with Brian Morrissey, "the Counselor to the Attorney General who [was] responsible for assisting OIP with FOIA requests for OAG documents" at the time, to ascertain what guidance or directives, if any, were provided to Mr. Huber. Brinkmann Opening Decl., ECF No. 16-3, at ¶ 14. Mr. Morrissey, in turn, "conferred with other Department officials with direct knowledge of the subject matter, including the then-[Office of the Attorney General (OAG)] Chief of Staff and U.S. Attorney Huber." *Id.* at ¶¶ 14-15. Based on these consultations, OAG advised that "when the Attorney General directed Mr. Huber to evaluate these matters, no written guidance or directives were

issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff." *Id.* ¶ 15. OAG explained that "details of Mr. Huber's direction were addressed orally, in meetings and discussions among a small group of Department officials, including the Attorney General, the Deputy Attorney General, the OAG Chief of Staff, the Principal Associate Deputy Attorney General, and U.S. Attorney Huber." *Id.* OIP confirmed this understanding of how guidance was provided to Mr. Huber with officials in ODAG. *Id.* Accordingly, OIP determined that further searches would not be likely to identify responsive records and rested on its "direct inquiry" search. *Id*. at ¶¶ 14-16; *see also id.* at ¶ 12.

In its opposition to Defendant's motion for summary judgment, Plaintiff's central argument against the adequacy of OIP's search was that it was not credible that there are no records responsive to the Guidance FOIA, given the nature of Mr. Huber's task and the Department's past practice in delegating responsibility to undertake an investigation to a special prosecutor. Plaintiff specifically argued that OIP should have conducted an electronic search of Mr. Huber's email account "for communications with a small handful of people in the Department's leadership offices," or alternatively, a search of "the email accounts of a small number of officials in the leadership offices . . . for communications with Mr. Huber." Pl.'s MSJ at 23. "Limited efforts" such as these, Plaintiff asserted, "could provide Plaintiff and the American people with clarity regarding the nature of the controversial investigation that the Attorney General has directed Mr. Huber to undertake into the president's political opponents and into allegations of misconduct by the Department and the FBI." *Id*. at 24.

On February 28, 2019, the evening DOJ's response-reply brief was due, OIP learned during final review of the brief of the existence of a record responsive to the Guidance FOIA. Brinkmann Second Decl. ¶ 6; Def.'s Unopposed Motion for Extension of Time, ECF No. 22, at

1. After the record came to light, DOJ immediately notified Plaintiff and the Court, and moved for a short extension of time to produce the record and to determine whether there were additional responsive records before filing its response-reply brief. *Id.* DOJ produced the record to Plaintiff on March 8, 2019. In a joint status report filed on March 7, 2019, DOJ stated that it would conduct an expedited, supplemental electronic mail search; produce any additional, responsive, non-exempt records found during this search by April 4, 2019; and file its response-reply brief by April 26, 2019.

The found record was the initial appointment letter from former Attorney General Sessions to Mr. Huber, sent by email by the Attorney General's Chief of Staff, Matthew Whitaker, to Mr. Huber, along with DOJ's November 13, 2017 letter to Congressman Goodlatte as an attachment. Brinkmann Second Decl. ¶ 6 & Ex. A. The cover email, which is dated November 22, 2017, simply says, "As we discussed. MW." *Id.* Ex. A. The appointment letter, also dated November 22, 2017, does not say much more than the attached Nov. 13, 2017 letter to Congressman Goodlatte. It states that the Attorney General has "requested that you review the matters referenced in the enclosed November 13, 2017 letter," which had already been made public, "and make recommendations to [the Attorney General] or the Deputy Attorney General, as appropriate." *Id.* It instructed that the review "need not include matters that you determine are within the scope of the investigation being conducted by Special Counsel Robert Mueller." *Id.* And it stated that Mr. Huber's recommendations "should include whether any matters not currently under investigation warrants the opening of an investigation, whether any matters currently under investigation require further resources or further investigation, and whether any matters would merit the appointment of a Special Counsel"—all as stated in the Nov. 13, 2017 letter. *Id.*

OIP searched for electronic communications between relevant custodians involved in Mr. Huber's evaluation to ensure that any additional communications like the appointment letter would be captured. *Id.* at ¶¶ 17–25. The search encompassed the senior leadership officials overseeing Mr. Huber's evaluation—former Attorney General Jeff Sessions, former OAG Chief of Staff Matthew Whitaker, Deputy Attorney General Rod Rosenstein, and Principal Associate Deputy Attorney General Robert Hur—as well as Mr. Session's two personal assistants. Brinkman Second Decl. ¶¶ 17, 20. The e-mail searches for Mr. Whitaker and Mr. Sessions, who recently left the Department, and Mr. Hur, who has changed components within the Department, were done using the same techniques applied to current Department officials such as Mr. Rosenstein. *Id.* ¶ 19 n.6. These records were reviewed to determine if they constituted "guidance" or "directives" provided to Mr. Huber "regarding the performance of" the evaluation, and were also analyzed to see if they contained any "leads" that would point OIP to additional records custodians. *Id.* ¶ 21. Because Mr. Huber is a U.S. Attorney, and OIP (which does not process FOIA requests on behalf of the Executive Office of the United States Attorneys) could not search Mr. Huber's e-mail inbox in the same manner as it can current or former officials of OAG or ODAG, OIP worked with Mr. Huber's office to search his e-mail "active archive" for all communications with Mr. Sessions, Mr. Whitaker, Mr. Hur, or Mr. Rosenstein. *Id.* at ¶ 25. In addition, the Executive Secretariat was searched for any records of official correspondence sent to Mr. Huber from the leadership offices. *Id.* at ¶¶ 22-24. These efforts turned up no additional records, and the Department reported its findings to Plaintiff on April 4, 2019. *Id.* at ¶¶ 14-15.

On April 15, 2019, eleven days before DOJ's response-reply brief, with its accompanying declaration describing the supplemental search, was due, Plaintiff moved to stay the summary judgment briefing and for discovery pursuant to Civil Rule 56(d). ECF No. 25-1. In that

motion, to which this brief also responds, Plaintiff contends that even though it had not yet seen the description of DOJ's supplemental search, it nonetheless needed discovery in order to challenge the adequacy of the search. In conferring with Plaintiff about its motion, DOJ suggested that the motion was premature and that Plaintiff wait until DOJ filed its response-reply brief and accompanying supplemental search declaration before deciding whether it needed discovery to oppose summary judgment. Plaintiff rejected that suggestion.

ARGUMENT

I. The Department Has Conducted, and Properly Described, An Adequate Search for Records Responsive to the "Guidance FOIA" Request

The only question properly before the Court is whether or not the Department has performed, and properly described, a search for records sufficient to discharge its obligations under FOIA. In order "[t]o meet its burden to show that no genuine issue of material fact exists, with the facts viewed in the light most favorable to the requester, the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Weisberg v. U.S. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The search "need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). The supporting declaration describing the search must "explain in reasonable detail and in a non-conclusory fashion the scope and method of the agency's search." *Swope v. U.S. Dep't of Justice*, 439 F. Supp. 2d 1, 5 (D.D.C. 2006).

OIP's search, and the supporting declarations describing that search (including the supplemental search declaration attached hereto) meet this standard. OIP engaged in extensive consultations with the relevant leadership offices about Mr. Huber's evaluation. *See* Brinkmann Opening Decl. ¶¶ 14–16; Brinkmann Second Decl. ¶¶ 7–13. Those consultations led to the

conclusion that no written guidance or directives were issued to Mr. Huber in connection with the directive to him to evaluate certain matters, based on the fact that these matters were discussed orally rather than in writing. Ms. Brinkmann believed this conclusion to be true at the time she attested to it in her declaration; that a responsive record has now surfaced does not mean that the officials who provided this information to Ms. Brinkmann were not "discharging their official duties properly and in good faith," were "gross[ly] negligent," or were engaged in a "deliberate effort to frustrate FOIA and hide nonexempt government records" as Plaintiff posits. Pl.'s Rule 56(d) Br. at 3. To the contrary, the discovery of responsive records after the government submits a search declaration is not an uncommon occurrence in FOIA litigation. *See, e.g.*, *Tushnet v. U.S. Immigration & Customs Enforcement*, 246 F. Supp. 3d 422, 432 (D.D.C. 2017) (Cooper, J.) ("[W]hen notified that it had not included the searches performed by two field offices, ICE's counsel stated at oral argument that the agency promptly rectified its mistake by reaching out to the Newark and San Antonio offices and producing additional records, which it described in a supplemental affidavit.").

As Ms. Brinkmann's supplemental declaration makes clear, OIP searched for the appointment letter during its initial search efforts upon learning that a draft of the document existed. (Because the draft itself was not "provided" to Mr. Huber, it was not deemed responsive.) OIP searched the Departmental Executive Secretariat, which maintains records of official, formal correspondence of OAG, and reached out to DOJ's Office of Legal Counsel to see if they had a copy of an appointment document directing Mr. Huber to evaluate the Goodlatte matters. Neither avenue identified the appointment letter. *See* Brinkmann Second Decl. ¶ 10–11. In addition, Mr. Morrissey conferred internally within OAG and with Mr. Huber about the "Guidance FOIA" request at the time of OIP's response to Plaintiff. *Id.* ¶ 9. Mr. Huber and Mr.

Morrissey have different recollections about what specifically they discussed, including the extent to which particular documents were discussed. *Id.* It was not until Mr. Huber's review of the reply brief that he brought the appointment letter sent to him by Mr. Whitaker to OIP, though a point of contact in ODAG. *Id.* ¶ 15. As soon as OIP discovered the appointment letter, the Department notified Plaintiff and the Court about it, processed and produced the record, and conducted a supplemental search tailored to identify any similar records. In other words, DOJ realized that it could no longer rely exclusively on the recollections of the relevant officials, given their failure to identify the appointment letter, and agreed that the electronic search Plaintiff sought was warranted. DOJ is also submitting with this brief a supplemental search declaration, and is not asking the Court rely on its previous declaration as "the sole source of evidence in this case." Pl.'s Rule 56(d) Br. at 3.

DOJ's supplemental electronic search was not only what Plaintiff asked for, it was clearly adequate to uncover any additional responsive records. OIP searched the email accounts of all of the senior leadership officials directly involved in supervising Mr. Huber's evaluation—former Attorney General Jeff Sessions, former OAG Chief of Staff Matthew Whitaker, Deputy Attorney General Rod Rosenstein, Principal Associate Deputy Attorney General Robert Hur—as well as Mr. Sessions' two personal assistants. Brinkmann Second Decl. ¶¶ 17, 20. The search term was simply "Huber" in the "To," "From," "cc," or "bcc" email message fields, to capture any communication with Mr. Huber, and thus any guidance or directives provided to Mr. Huber if it existed. *Id*. ¶ 20. The timeframe of the search was from July 27, 2017 (the date of the first letter Congressman Goodlatte sent to Attorney General Sessions) to January 19, 2018, the date that OIP initiated its search efforts for Plaintiff's FOIA requests. *Id.*; *see also* 28 C.F.R. § 16.4(a) ("In determining which records are responsive to a request, a component ordinarily will include

only records in its possession as of the date that it begins its search."). The official then reviewed any such correspondence to determine whether it "contained any guidance or directives regarding Mr. Huber's appointment to evaluate the matters raised in Congressman Goodlatte's letters," and also considered whether any records, even if non-responsive, contained "any 'leads' which would indicate other potential records custodians." Brinkmann Second Decl. ¶ 21. In addition, an official in Mr. Huber's office conducted a manual search of Mr. Huber's electronic mailbox, looking for any correspondence between Mr. Huber and Attorney General Sessions, OAG Chief of Staff Matt Whitaker, Deputy Attorney General Rod Rosenstein, or Principal Associate Deputy Attorney General Robert Hur, again applying the timeframe of July 27, 2017 through January 19, 2018. *Id.* ¶ 25.

Lastly, OIP searched Departmental Executive Secretariat (DES), the official records repository of OAG and ODAG, which maintains records of formal, controlled, unclassified correspondence sent to or from those offices from January 1, 2001, to the present. *Id.* ¶ 22-24. OIP had previously searched the DES for the appointment letter, upon learning that there was a draft of it. OIP subsequently learned that due to an administrative oversight, the appointment letter had not been logged into the DES and consequently was not found at that time. *Id.* ¶ 10. As part of its supplemental search, OIP conducted a search for records in the electronic database of the DES using several combinations of search parameters: (1) correspondence where Mr. Huber was listed as "contact" (either sender or recipient); (2) correspondence where Attorney General Sessions was listed as a "contact" and contained the keyword "Huber," and (3) a general keyword search for correspondence containing the keywords "Sessions" and "Huber." *Id.* ¶ 23. The timeframe of this search was consistent with OIP's email searches—that is, July 27, 2017 to January 19, 2018. *Id.* In addition, OIP took remedial steps to emphasize the importance of

record keeping protocols with OAG and help ensure that such a mishap does not happen again. *Id.* ¶¶ 28.

Based on both the records searches conducted, as well as the extensive consultation with Department officials OIP has undertaken in order to understand Mr. Huber's work, the Department's efforts are "reasonably calculated" to turn up all documents responsive to Plaintiff's request. Nothing further is required from the Department under FOIA. The Department's search is not inadequate because no record other than the one released to Plaintiff was identified. This Court and the D.C. Circuit have held on multiple occasions that a search that produces little to no records is not necessarily inadequate, "even if the slim yield may be intuitively unlikely." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.D.C. 2003); *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990) (rejecting argument that "the search was unreasonable because the agency did not find responsive documents that appellant claims must exist," in light of the "importance" of the meeting that was the subject of the request). Speculation that records must exist is not a basis for denying summary judgment. *Oglesby*, 920 F.2d at 67 n.13; *SafeCard Servs., Inc. v. Secs. & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (recognizing that agency affidavits describing a search "cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" (quoting *Ground Saucer Watch, Inc. v. Cent. Intelligence Agency*, 692 F.2d 770, 771 (D.C. Cir. 1981))); *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 292 F. Supp. 3d 284, 288 (D.D.C. 2018) (rejecting argument that search was unreasonable it was "not credible" that "no paper trail exists of what the attorney general has represented was a careful, deliberate decision" on a high profile matter, since it was not "unheard of that an official might

receive sensitive advice orally rather than in writing").

Nor is it at all surprising that OIP's comprehensive search identified no responsive records beyond the appointment letter. It remains the case that "details of Mr. Huber's direction were addressed orally, in meetings and discussions among a small group of Department officials." Brinkmann Opening Decl. ¶ 15. The appointment letter is essentially a *pro forma* authorization to Mr. Huber to conduct the evaluation that provides no more detail about the nature of Mr. Huber's work than what has already been disclosed. Plaintiff itself acknowledged in its opposition brief that it was "highly likely" that an electronic search "would yield only a limited number of potentially responsive communications to be processed." Pl.'s MSJ Br. at 23. OIP's search is consistent with that prediction.

To the extent Plaintiff continues to argue that there should be more responsive records, Plaintiff's perception of what records should exist in this case is invariably tainted by its conflation of Mr. Huber's appointment with that of "special prosecutors" asked to conduct investigations in the past when there was already sufficient predication to launch an investigation. *See, e.g.*, Pl.'s MSJ Br. at 20–21; Pl.'s Rule 56(d) Br. at 17–18. Mr. Huber was not asked to conduct an "investigation"; he was tasked with "evaluat[ing]" issues and "mak[ing] recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel," under the supervision of the Attorney General and Deputy Attorney General. Brinkmann Opening Decl., ECF No. 16-3, Ex. A, Boyd Letter of Nov. 13, 2017, at 1. Mr. Sessions' update in March 2018 to the chairmen of the Judiciary and Oversight committees in both houses of Congress reaffirmed the limited scope of Mr. Huber's mandate. Brinkmann Opening Decl., Ex. A, Sessions Letter of Mar. 29, 2018, at 3–

4. The Department has asked U.S. Attorneys in the past to conduct similar evaluations to determine if there is sufficient predication to launch an investigation.[1] Moreover, neither letter mentions any of the statutes that have been invoked in the past when the Department has made a delegation of investigative authority, such as 28 U.S.C. §§ 509, 510 and 515. Suggesting that Mr. Huber's work goes beyond this pre-investigational evaluation is baseless speculation that cannot be used to call into question the Department's efforts to conduct a records search.

In short, whatever basis may have existed previously for challenging the Department's initial search for records no longer exists. As supplemented, the search the Department performed is more than adequate to capture records responsive to the Guidance FOIA.

II. Plaintiff Has Not Alleged Sufficient Facts to Rebut the Presumption of Regularity Afforded the Department's Affidavits Regarding its Search

Without even seeing DOJ's supplemental search declaration detailing its supplemental search, Plaintiff argues that the supplemental search "does not resolve the material facts in dispute." Pl.'s Rule 56(d) Br. at 12. Plaintiff claims that "in conducting its supplemental search, Defendant ignored the fundamental flaw it was attempting to cure: if Mr. Whitaker and Mr. Huber had forgotten about (or deliberately overlooked) an email containing a formal directive from the attorney general, is it not possible that they forgot other categories of responsive records as well?" *Id.* at 13–14. But this was, of course, why OIP conducted its supplemental search to begin with—to determine if there were other responsive records that elided the recollection of the consulted officials. Plaintiff's argument seems to be that no supplemental search the

[1] Cafasso Opening Decl., ECF No. 9, Ex. 9 (Attorney General Mukasey) ("A preliminary inquiry is a procedure the Department … uses regularly to gather the initial facts needed to determine whether there is sufficient predication to warrant a criminal investigation…."); *Id.* Ex. 11 (Attorney General Holder) ("The Department regularly uses preliminary reviews to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter.")

Department could conduct would be sufficient to quell its concerns about the "misrepresentation" in the government's declaration, and discovery is therefore necessary. That conclusion is legally erroneous and the Court should reject it.

As Plaintiff acknowledges, discovery is rare in FOIA litigation. *Baker & Hostetler, LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). That is because "[a]gency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc.*, 926 F.2d at 1200 (internal citations omitted). "Although misstatements in an agency's FOIA response can portend an inadequate search, [m]istakes alone do not imply bad faith." *Tushnet*, 246 F. Supp. 3d at 432–33. Even when a plaintiff can "show[] . . . specific responsive documents that exist and were not produced" by an agency in response to a FOIA request, it "does not rebut the presumption of good faith accorded to agency affidavits." *Fischer v. U.S. Dep't of Justice*, 723 F. Supp. 2d 104, 109-10 (D.D.C. 2010). What "good faith" does require of "a law-abiding agency is that it admit and correct error when error is revealed." *Meeropol*, 790 F.2d at 953. Indeed, an "agency's cooperative behavior of notifying the Court and plaintiff that it had discovered a mistake, if anything, shows good faith." *Fischer*, 723 F. Supp. 2d at 109; *see also Military Audit Proj. v. Casey*, 656 F.2d 724, 753–54 (D.C. Cir. 1981) (rejecting argument that summary judgment on basis of agency affidavits was inappropriate because, by releasing documents during litigation "at the behest of the appellants," "the agency admitted that it was initially in error, from which it follows that the agency is fallible, and its affidavits, suspect.").

Plaintiff's central claim is that the presumption of good faith no longer applies, and, accordingly, discovery is appropriate, because of the discrepancy between the "belatedly

discovered record and the false representations contained in the initial declaration." Pl.'s Rule 56(d) Br. at 20–21. Plaintiff offers all kinds of speculation as to why the discrepancy is troubling, arguing that the timing of the investigation and the high-profile nature of Mr. Huber's assignment make it implausible to believe that the record was simply overlooked.[2] *Id.* at 17–18. But ultimately, the error is the only thing Plaintiff points to as a basis for discarding the presumption of good faith. An error alone, and one that the agency has acknowledged, explained, and corrected at that, is not sufficient to vitiate the presumption of good faith and justify discovery in a FOIA case. *Meeropol*, 790 F.2d at 953.

Courts in this Circuit routinely reject arguments that an agency's declarations can no longer be accepted in good faith simply because an agency's initial search was inadequate or it made an incorrect statement in a declaration, particularly when the agency discovers the issue and notifies the court. *Tushnet*, 246 F. Supp. 3d at 432 (finding presumption of good faith was not rebutted despite "a series of errors and inconsistencies found across . . . multiple declarations"); *Competitive Enterprise Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 136 (D.D.C. 2016) ("*CEI I*") ("Although the initial Leonard Declaration contained a significant

[2] Relatedly, Plaintiff argues that "[t]he unexplained delay by DOJ in actually producing the responsive record once it was identified is also not encouraging," Pl.'s Rule 56(d) Br. at 21 n.6, but does not explain how it is legally relevant to the issues before the Court, other than to speculate that there might have been some ulterior motive for doing so. *See Goland v. CIA*, 607 F.2d 339, 355 (D.C. Cir. 1978) ("[I]n view of the well-publicized problems created by the ... time limits for processing FOIA requests and appeals, the [agency's] delay alone cannot be said to indicate an absence of good faith." (footnote omitted)); *Uhuru v. U.S. Parole Comm'n*, 734 F. Supp. 2d 8, 12 (D.D.C. 2010) (denying judgment in plaintiff's favor based on delay in processing his FOIA request because "delay in the release of the requested records alone is not a basis for granting the relief plaintiff demands"). Plaintiff does not explain how the Department accrued any benefit, whether through public relations or anything else, by releasing the delegation letter a few days after Mr. Whitaker's departure from the Department, as opposed to before, and no such benefit exists. In any event, that the Department released the record *one week* after identifying it hardly constitutes an unwarranted delay.

error—asserting that none of the drafts were shared outside the Executive Branch—mistakes alone do not imply bad faith."); *Leopold v. Dep't of Justice*, 130 F. Supp. 3d 32, 41–42 (D.D.C. 2015) (rejecting argument that "errors in the Brinkmann Declaration indicate bad faith on the part of Defendant" after plaintiff pointed out several statements in that declaration were in error and defendant submitted a supplemental declaration addressing the errors); *Fischer*, 723 F. Supp. 2d at 108 ("past lapses in producing requested information," including "delays in document production" and "inconsistent reports by the FBI of how many responsive files had been found," not sufficient to disrupt presumption of good faith); *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 404 F. Supp. 2d 325, 333–34 (D.D.C. 2005) ("While it now seems obvious that the defendant's initial search was inadequate, and it is clear that the defendant could have been more diligent in its initial response to the plaintiff's FOIA request, this does not demonstrate bad faith.").

Indeed, courts only set aside the presumption of good faith and order discovery in rare circumstances. For instance, in *Competitive Enterprise Inst. v. Office of Sci. & Tech. Policy*, 185 F. Supp. 3d 26, 28-30 (D.D.C 2016) ("*CEI II*"), the court ordered discovery after the defendant revised its declaration and search numerous times in response to new revelations that its search had missed responsive documents that were subsequently found in the public domain. *Id.* at 28-29. It concluded the defendant's "representations that it conducted a reasonable search designed to locate all relevant records has proven to be inaccurate time and again." *Id.* at 29. But prior to that point, the court had refused to order discovery based on "[defendant's] tardy admission that it had submitted an inaccurate declaration in support of its motion for summary judgment and had overlooked a draft that had been shared outside the government." *CEI I*, 161 F. Supp. 3d at 135-36 (D.D.C. 2016) (internal quotation marks omitted). In *CEI I*, the court held that even a

"significant error" in a declaration is not a basis for discovery in FOIA cases, particularly when the agency identifies the error, reports it to the court, and sets out to correct it. *Id.* at 136.

Other recent cases cited by Plaintiff where discovery has been ordered point to similarly systemic issues in the agency's handling of a FOIA request, especially when the government dismisses or fails to acknowledge errors. In *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, No. 05-2078 (EGS), 2006 WL 1518964, (D.D.C. June 1, 2006), the plaintiff sought discovery after protracted delays by the defendant in processing an expedited FOIA request, which included taking five months to exhaust two hours of "free search" time and seven months to process a fee waiver, all while not producing a single responsive record. 2006 WL 1518964, at *2. Because the government had no response as to why the expedited request was taking "substantially longer than the average processing time for other expedited requests," going so far as to completely dismiss the relevance of the delay, the court ordered discovery to understand the reasons for the delays. *Id.* at *6. Likewise, in *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Veterans Affairs*, 828 F. Supp. 2d 325 (D.D.C. 2011), an agency official made "inaccurate statements in two declarations," and then failed to provide a second supplemental declaration to the plaintiff until the day of his deposition. 828 F. Supp. 2d at 333. Even then, the second supplemental declaration "did not correct his prior inaccurate statements—or suggest that they were inaccurate in any way." *Id.* at 333–34. A declaration from another agency official that was supposed to address these concerns was also not provided to plaintiff's counsel prior to deposition as it should have been, and even this deposition "had to be supplemented after its deficiencies were pointed out by" plaintiff. *Id.* at 334. "These litigation tactics . . . rendered [the official's] deposition at best incomplete, and perhaps useless," which prompted the court to order further discovery. *Id.*

In *Pulliam v. U.S. Envtl. Prot. Agency*, 292 F. Supp. 3d 255 (D.D.C. 2018), the court ordered a deposition to be taken when the agency's second declaration averred that it had "originally asked [its electronic search service] to search all electronic files," even though its initial declaration was limited to an e-mail search and the agency never attempted to correct the court's prior ruling that the initial search was inadequate because it had failed to include electronic files. 292 F. Supp. 3d at 260-61. And in *Long v. U.S. Dep't of Justice*, 10 F. Supp. 2d 205 (N.D.N.Y. 1998), the court ordered discovery after affidavits by "three local employees" in regional U.S. Attorney offices conflicted with two affidavits by employees in the Executive Office of the United States Attorneys as to where records were located, as well as concerns that "records were destroyed . . . six months after plaintiffs' FOIA requests," which "brought into question" whether the search was being carried out in good faith. 10 F. Supp. 2d at 210.

Plaintiff also relies on FOIA cases in which discovery has been ordered where there was evidence the agency was attempting to evade a FOIA request by using unapproved methods for communicating about agency business, but that circumstance is not present in the instant case. For instance, in *Landmark Legal Foundation v. EPA*, 959 F. Supp. 2d 175 (D.D.C. 2013), the court ordered discovery to address the use of personal e-mail by senior agency officials and the decision to excuse such officials from plaintiff's search for records. 959 F. Supp. 2d at 184. Discovery was necessary, in the court's view, because the record "rais[ed] the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA" by communicating on systems that could not be searched, or engaging in "unreasonable and bad faith reading[s]" of FOIA requests in order to exclude top agency officials. *Id.* Similarly, the court in *Judicial Watch, Inc. v. U.S. Dep't of State*, 344 F. Supp. 3d 77, 80-81 (D.D.C. 2018) ordered discovery to resolve questions about whether former Secretary of State Clinton used a

private e-mail server to thwart FOIA, and whether the State Department attempted to settle a FOIA case to avoid disclosing the existence of that email usage. And in *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28 (D.D.C. 1998), the presumption of good faith was rebutted by four years of serious record-related misconduct by the defendant, including destruction of records subject to FOIA requests. 34 F. Supp. 2d at 30–40.

The only case Plaintiff seriously attempts to analogize this one to is *Bangoura v. U.S. Dep't of the Army*, No. 05-0311, 2006 WL 3734164 (D.D.C. Dec. 8, 2006). *See* Pl.'s Rule 56(d) Br. at 20–21. There, the court ordered discovery after it found the declarations submitted by "the Defendant d[id] not describe in reasonable detail the methods used in conducting its search, and fail to explain why more documents were found after the Plaintiff was told twice there were no more documents to be found." *Bangoura*, 2006 WL 3734164, at *6. It was critical to the court's decision that the Defendant could "not provide any rationale for the delay in finding the requested documents and does not explain why the search procedures were not adequate enough to find the documents during the initial search." *Id.*; *see also Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 370–71 (D.C. Cir. 1980) (discovery ordered after concluding "the agency affidavits now before us do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable Weisberg to challenge the procedures utilized."). Not so here. Ms. Brinkmann's second declaration thoroughly explains why the initial procedures undertaken missed the responsive record at issue until February 28, and the steps OIP has taken in order to correct the issue.

As regrettable as a "significant error" in an agency declaration is, it is not a sufficient legal basis for ordering discovery in a FOIA case. *CEI I*, 161 F. Supp. 3d at 135-36. The Department's course of conduct after identifying the appointment letter is entirely consistent

with continuing to apply the presumption of good faith. The Court need not hesitate in entering summary judgment on the authority of the Department's updated declarations.

III. Plaintiff's Requested Discovery Is Not Appropriate

The specific discovery Plaintiff requests betrays Plaintiff's overreach and the inappropriateness of discovery. FOIA requires agencies to conduct a reasonable search for agency records in response to requests from the public. When "an agency's affidavits or declarations are deficient regarding the adequacy of its search . . . the courts generally will request that the agency supplement its supporting declarations." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002) (denying plaintiff's discovery request but ordering defendant to conduct supplemental searches and submit updated affidavits before renewing its motion for summary judgment). FOIA is not an opportunity for Plaintiff to explore the methodology, strategy, or motives of government officials, except as they are reflected in the records requested. *See Flowers v. Internal Rev. Serv.*, 307 F. Supp. 2d 60, 71 (D.D.C. 2004) (rejecting request to discard presumption of good faith and order discovery because it was "apparent to the court . . . that plaintiff's challenge is not about the adequacy of the IRS' searches," but an attempt "to investigate the IRS' motives in selecting her for an audit").

Plaintiff's motion sets forth twelve topics of potential discovery it would like to pursue, through both interrogatories and "time-limited depositions" of certain individuals, including Mr. Whitaker and Mr. Huber. Pl.'s Rule 56(d) Br. at 21–26. It avers that these topics are "necessary to determine what custodians, locations, and systems of records should have been searched to conduct a search reasonably calculated to identify all responsive records." *Id.* at 24. It also argues that the discovery is necessary to "address the question of whether the misrepresentations contained in the initial declaration resulted from negligence or a lack of good faith in the discharge of the agency's responsibility to conduct a search for responsive records." *Id.*

But Ms. Brinkmann's supplemental declaration (submitted after Plaintiff filed its motion, of course) already adequately answers these questions, to the extent they are relevant to determining whether the Department conducted an adequate search for records responsive to the Guidance FOIA. The individual requests for discovery underscore the inappropriateness of discovery in this case.[3]

A. Information About Meetings Is Not Relevant to a Search for Records of Guidance or Directives Provided to Mr. Huber

Plaintiff seeks discovery on "the number of meetings or conversations Mr. Huber had" with OAG and ODAG; "how those meetings or conversations took place"; and "who was present during those meetings or conversations." Pl.'s Rule 56(d) Br. at 22-23 (requests (a), (b), and (c)). These requests echo Plaintiff's earlier arguments in its opposition to the Department's motion for summary judgment regarding the level of detail in Ms. Brinkmann's initial declaration about meetings with Mr. Huber. Pl.'s MSJ Br. at 12. But knowing when meetings occurred, how they were conducted, or who was in them—while clearly of interest to Plaintiff—has no logical connection to whether Department officials provided written "guidance or directives" to Mr. Huber, which is all Plaintiff has requested respecting the Guidance FOIA. For

[3] Moreover, Plaintiff seems to confuse the criteria for ordering discovery in a FOIA case with the topics for which discovery should be permitted in a FOIA case. The relevant legal question in FOIA is the adequacy of the Department's search for records, and that, in turn, is the only permissible topic for discovery. "Good faith" is only at issue with respect to whether the agency's affidavits are sufficient to adjudicate summary judgment. Plaintiffs are not permitted to take discovery in a FOIA case to see if there has been a lack of good faith; rather, good faith is *presumed*, and the Plaintiff must show from the record before the Court that it is no longer warranted in order for the Court to permit discovery on the operative legal question of whether an adequate search for records has been conducted. *See* U.S. Dep't of Justice, Guide to the Freedom of Information Act, "Litigation Considerations" at 113 (Nov. 26, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf ("Discovery is "ordinarily confined … to the scope of an agency's search, its indexing and classification procedures, and other similar matters."). That showing has not been made here, for the reasons just discussed.

instance, Mr. Sessions's executive assistants were searched not because they had a role in supervising Mr. Huber's work, but because their relationship to Mr. Sessions opened the possibility that they had "transmitted communications on his behalf." Brinkmann Second Decl. ¶ 20. The searches the Department has performed are reasonably calculated to uncover records responsive to Plaintiff's request based on its understanding of how Mr. Huber's evaluation is being supervised by OAG and ODAG, regardless of the setting of the meetings or who attended them.

To the extent that Plaintiff is concerned that it cannot verify whether the individuals the Department chose to search after disclosing the appointment letter are insufficient, those concerns should be put to rest by Ms. Brinkmann's second declaration. As she explains, the custodians selected were the "senior leadership officials overseeing Mr. Huber's evaluation," and were consistent with the appointment letter by Mr. Sessions, the November 22, 2017 letter and the transmittal e-mail sent by Mr. Whitaker. Brinkmann Second Decl. ¶ 17. Moreover, OIP's review of communication was done with an eye toward "identifying any 'leads' which would indicate other potential records custodians, but not such leads were identified." *Id.* ¶ 22. If the Court determines that a more detailed description of why the custodians selected were chosen is necessary, or concludes that additional individuals need to be searched, it can simply order the Department to undertake those tasks. Discovery into those questions is not needed.

B. Information About Drafts, Background Materials, Talking Points, Memoranda to File, or Handwritten Notes Are Not Relevant to a Search for Guidance or Directives Provided to Mr. Huber

The next broad category of discovery topics Plaintiff requests are addressed to work product materials, such as drafts and notes, that Plaintiff speculates Department officials must have prepared in connection with their discussions with Mr. Huber. They include "records . . . used, exchanged, made available, or created in connection with those meetings that reflect

guidance or direction provided to Mr. Huber, such as background materials, talking points, memoranda to file, or handwritten notes," and the names of individuals "involved in the drafting or review of the Attorney General Directive" other than the individuals searched for records. Pl.'s Rule 56(d) Br. at 23 (requests (d) and (e)). As with Plaintiff's request for meeting details, these requests harken back to arguments Plaintiff made in its summary judgment motion as to why the initial search for records was not adequate. Pl.'s MSJ Br. 21-23.

These inquiries are nothing more than an effort to expand Plaintiff's FOIA request after the fact. Plaintiff's original FOIA request asked for "[a]ll guidance or directives *provided to*" Mr. Huber "regarding [his] performance" of the evaluation of the issues raised by Mr. Goodlatte. Compl., ECF No. 1, at ¶ 14 (emphasis added). A draft of such a document would only be responsive if the Department "provided" it to Mr. Huber, and despite searching months of Mr. Huber's relevant e-mail (including e-mail sent by Mr. Whitaker), no such records have been identified. Even if they did exist, the identity of their drafter would not be relevant. Likewise, Plaintiff's assertion that records such as "background materials, talking points, memoranda to file, or handwritten" notes are responsive because they might provide insight into what information Mr. Huber received during briefings with Department leadership misses the point because, even if such records exist, they have not been "provided" to Mr. Huber. Pl.'s Rule 56(d) Br. at 23. Although they might reflect information provided to Mr. Huber orally, FOIA "deals with 'agency records,' not information in the abstract," *Forsham v. Harris*, 445 U.S. 169, 185 (1980).

If Plaintiff wanted the Department's records reflecting or memorializing the discussions it held with Mr. Huber, it could have requested them. In its "Recusal FOIA," Plaintiff asked for "[a]ll records *reflecting* any analysis of government or legal-ethics issues." Compl. ¶ 7

(emphasis added). And the "Drafting FOIA" similarly asked for "[a]ll records *relating* to the drafting of the November 13, 2017 letter" signed by Mr. Boyd. *Id.* ¶ 18 (emphasis added). Similarly, Plaintiff could have asked for records "*reflecting* directives or guidance provided to" Mr. Huber, but it did not. *See also Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 337 (D.D.C. 2018) (concluding that attachments to e-mails between the agency and the presidential transition team were responsive to a request for "[a]ll records reflecting communications (including emails ... or any other records reflecting communications)"). Plaintiff is a sophisticated and frequent FOIA requestor; it chose a more narrow approach with respect to the "Guidance FOIA," and cannot revise that approach now. The Department must read Plaintiff's request "as drafted, not as either agency officials or [Plaintiff] might wish it was drafted." *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984).

C. Plaintiff's Request for Information About the Department's Procedures and Methods for Conducting its Search Is Adequately Addressed by the Department's Affidavits

Most of Plaintiff's remaining topics go to the adequacy and methods of the search OIP conducted for records, including the existence of records provided to Mr. Huber in ways "other than by electronic mail"; whether systems outside those the Department uses for record-keeping were used to communicate with Mr. Huber, "such as text messages," instant messaging systems "such as Lync or Slack," "voicemails, handwritten notes, or other medium of communication"; the nature of the Department's responsiveness review for records; and the Department's record handling practices for employees who change components or leave the Department. Pl.'s Rule 56(d) Br. at 23 (topics (f), (g), (h), (i), (j), and (k)). To the extent these methodological questions are relevant to Plaintiff's request, they are answered by Ms. Brinkmann's supplemental declaration, which provides the rationale as to why the Department's search for records, including both its supplemental search and its original inquiries, adequately describes why its

search was reasonably calculated to capture responsive records.

Plaintiff's larger effort to make the late discovery of the appointment letter a basis for unchecked discovery into the Department's handling of not only the "Guidance FOIA," but all FOIA cases, is plainly inappropriate. The only record the Department has identified, to date, was sent between two agency officials through the agency's e-mail systems, and the failure of the search to capture this document does not imply that non-standard methods of conducting agency business or transferring records from OAG and ODAG to Mr. Huber were used. FOIA does not require the agency to "set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). The Department's search cast a broad net for any evidence of communications between Mr. Huber and Department leadership, and OIP evaluated those records for responsiveness and to identify "leads" for additional custodians before making its final "no records" determination. These efforts were not impacted by the departure of officials from OAG or ODAG. Brinkmann Second Decl. ¶ 19. The individual to whom the Department was "providing" the "guidance or directives" Plaintiff seeks, Mr. Huber, remains employed by the Department, and broad discovery into procedures for searching departed or transferred employees would not materially advance Plaintiff's request for records.

D. Plaintiff's Request for Information About the Error in Ms. Brinkmann's Initial Declaration Is Adequately Addressed in Her Second Declaration, and Is Otherwise Overbroad

Finally, Plaintiff seeks information about "[h]ow and why it came to be" that Ms. Brinkmann's initial declaration contained a material misstatement. Pl.'s Rule 56(d) Br. at 24 (topic (l)). Again, to the extent this is relevant to the question of whether an adequate search for records has been conducted, Ms. Brinkmann's supplemental declaration provides sufficient explanation of the late discovery of the appointment letter. Further discovery to satisfy

Plaintiff's curiosity is not appropriate.

CONCLUSION

For these reasons, the Department respectfully requests that the Court grant its motion for summary judgment, deny Plaintiff's cross-motion for summary judgment, and deny Plaintiff's motion to stay summary judgment briefing and for leave to seek limited discovery pursuant to Rule 56(d).

Dated: April 26, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 1:18-cv-00319

SECOND DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (DOJ). In this capacity, I am responsible for, among other things, reviewing records and coordinating the handling of Freedom of Information Act (FOIA) requests processed by the Initial Request Staff (IR Staff) of OIP that are subject to litigation. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from within six senior leadership offices of DOJ, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO). The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other personnel in the Executive Branch.
2. I make the statements herein on the basis of personal knowledge, and on information

acquired by me in the course of performing my official duties, including information provided to me by other knowledgeable personnel within the Department.

3. In my declaration of November 16, 2018, I described Plaintiff's FOIA requests to OIP, as well as the IR Staff's processing of those requests on behalf of OAG, ODAG, and OLA, the search conducted in response to Plaintiff's requests, and the responses to Plaintiff in fulfillment of its requests. *See* ECF No. 16-3.

4. Of the four FOIA requests originally at issue in this case, by the time Defendant was preparing its response to Plaintiff's cross-motion for summary judgment and reply brief in support of its motion for summary judgment, the only remaining issue pertained to the adequacy of the search conducted in response to the "Guidance Request," which yielded no records responsive to that request. *See* Pl.'s S.J. Mot., ECF No. 18-1 at 10.

5. On November 16, 2018, in support of the Department's motion for summary judgment regarding the adequacy of the records search conducted in response to the Guidance FOIA Request, I submitted my first declaration, which described OIP's search efforts in response to that request and, specifically, detailed the "targeted inquiry" search method which resulted in my being informed that no written guidance or directives were issued to Mr. Huber in connection with his evaluation of certain matters raised by Congressman Goodlatte. *See* Brinkmann Declaration, ECF No. 16-3 at ¶¶ 14–16. My declaration described discussions I had with individuals in OAG and, to a lesser extent, ODAG, as a basis for the determination that the information provided to me by OAG regarding the lack of written guidance or directives to Mr. Huber, combined with OIP's review of records in response to Plaintiff's Drafting Request (which, likewise, did not indicate the existence of written guidance or directives) was adequate and that further searches would

be unlikely to identify records relevant to Plaintiff's Guidance Request. *Id*. at ¶ 15–16.

6. This declaration supplements and incorporates by reference my first, November 16, 2018 declaration, and serves three purposes. First, it provides additional details regarding the initial search that resulted in the issuance of a "no records" response to the Guidance FOIA request on July 16, 2018. Second, this declaration provides additional information regarding the discovery of a small number of records responsive to the Guidance FOIA request subsequent to the filing of my first declaration. Those records, which were provided to Plaintiff in a supplemental response on March 8, 2019, consisted of one email dated November 22, 2017 from then-OAG Chief of Staff Matthew Whitaker to U.S. Attorney Huber, transmitting (1) a letter of that same date from Attorney General Sessions to Mr. Huber, requesting that he review matters referenced in Congressman Goodlatte's letter, and (2) a copy of the Department's November 13, 2017 letter to Congressman Goodlatte [hereinafter "the Boyd letter"].[1] *See* Exhibit A. Third, this declaration outlines the steps taken to address the fact that responsive records were indeed located after the filing of my first declaration stating that no such records could be located—including an assessment of the initial records search and remedial steps taken to address the fact that the records were not located in that search, and the conducting of comprehensive email searches of the officials identified as having been involved in the topic of Plaintiff's requests, in order to ensure that no other records maintained by those officials were missed.

[1] OIP notes that the Boyd letter to Congressman Goodlatte is publicly available and was, in fact, attached to Plaintiff's FOIA request.

Additional Details Regarding Initial Search Conducted in Response to the Guidance FOIA Request

7. My November 16, 2018 declaration summarizes the results of the targeted search inquiries OIP conducted in response to Plaintiff's Guidance Request. *See* Brinkmann Declaration, ECF No. 16-3 at ¶¶ 14–16. In light of the subsequent discovery of records responsive to this request and to dispel concerns raised by Plaintiff regarding this search, I provide greater detail herein about the search efforts OIP engaged in and the resulting determination made to Plaintiff on July 16, 2018 that no responsive records were identified, beyond the Boyd letter.

8. OIP's initial targeted search was directed to knowledgeable staff in OAG and ODAG. In particular, I was advised by OAG that "details of Mr. Huber's direction were addressed orally, in meetings and discussions among a small group of Department officials," including the Attorney General, the Deputy Attorney General, the OAG Chief of Staff, and the Principal Associate Deputy Attorney General. *See id.* ¶ 15. During the course of OIP's targeted inquiry to OAG, I spoke on multiple occasions with OIP's contact in OAG for FOIA matters—the Counselor to the Attorney General referenced in my prior declaration, Mr. Brian Morrissey.

9. In connection with our discussions regarding the Guidance Request prior to OIP's July 16, 2018 response to Plaintiff, Mr. Morrissey conferred internally within OAG and with Mr. Huber. Mr. Huber and Mr. Morrissey have different recollections about what specifically was discussed, including the extent to which particular documents were discussed. Although the November 22, 2017 Sessions letter to Huber was not identified by Mr. Morrissey at that time, the November 13, 2017 Boyd letter was identified. Notably, the Boyd letter is considerably more substantive in terms of the direction given

to Mr. Huber, and is cited in and attached to the November 22, 2017 letter as laying out the matters that Mr. Huber was being directed to review. Moreover, Mr. Morrissey also brought to my attention that a short draft appointment document (possibly a memorandum) had been circulated. Although I determined that such a draft would not be responsive to Plaintiff's request since it would not have been issued to Mr. Huber, in an abundance of caution, both Mr. Morrissey and OIP took steps to track down the draft document, and/or any final version of that document (which, of course, would most likely be responsive to Plaintiff's request).

10. OIP conducted a targeted search for a final version of the draft letter in the official records repository for OAG, the Departmental Executive Secretariat (DES).[2] As OAG's official records repository, the DES maintains records of official, formal correspondence of OAG and, accordingly, would have been expected to maintain a letter signed by the Attorney General, if one existed. OIP's search of the DES did not locate the signed appointment letter. As discussed *infra*, OIP subsequently learned that due to an administrative oversight, the appointment letter failed to be logged into the DES. If not for that oversight, the November 22, 2017 Sessions to Huber letter would have been located and provided to Plaintiff at that time—i.e., as part of OIP's July 2018 response to Plaintiff.

11. In order to run down all leads, OIP also reached out informally to another Department component, the Office of Legal Counsel (OLC), to find out if they had a copy of an appointment document directing Mr. Huber to evaluate the Goodlatte matter. Mr. Morrissey had informed me that OLC may have reviewed the draft appointment

[2] For a fuller description of the DES, see discussion of the supplemental search conducted after locating the signed appointment letter, *infra*.

document.[3] OLC checked an internal repository of final legal advice for records referencing Mr. Huber but did not identify anything related to his involvement in the Goodlatte matter. OLC also inquired with an official who would have been involved in any review by OLC of the draft document. That official did not recall learning whether the draft letter had been finalized or transmitted. OLC informed OIP that it had not identified any final appointment document.

12. Additionally Mr. Morrissey undertook his own efforts to locate the draft document, through discussions with others in OAG and with OLC, but was unable to locate it at that time.

13. As a result of these efforts, OIP determined, in consultation with OAG, that the appointment document, if it did exist, most likely had been drafted but never finalized nor delivered to Mr. Huber, which was consistent with various corroborating factors: (1) that individuals involved in the matter had indicated that no written guidance or directives existed; (2) that no final letter or memorandum to Mr. Huber was located in the targeted DES search; and (3) that OLC did not have a copy of a formal appointment to Mr. Huber regarding the Goodlatte matter. Because the draft appointment letter did not appear to have been provided to Mr. Huber, I determined that such a draft, standing alone, would not be responsive to Plaintiff's Guidance Request. Therefore, I concluded that no additional searching was necessary "[i]n light of the clear, comprehensive, and conclusive information I received directly from OAG, and the lack of any indication that other records responsive to Plaintiff's Prosecutors or Guidance Requests exist[ed] in leadership office files." *See* Brinkmann Declaration, ECF No. 16-3 at ¶ 16. As a result,

[3] The Office of Legal Counsel is tasked with reviewing proposed formal orders of the Attorney General.

on July 16, 2018 OIP issued its final response to Plaintiff, with the determination that there were no records responsive to the Guidance FOIA request, other than the Department's November 13, 2017 response to Congressman Goodlatte. *See id.* at ¶ 7.

14. In October 2018, Mr. Morrissey again undertook efforts to locate the draft appointment letter and, this time, was successful in locating it. Mr. Morrissey provided the draft to me, and I once again confirmed that the draft would not be responsive to the Guidance FOIA Request. At that time, neither I nor Mr. Morrissey had any information indicating that the draft had been finalized.

Information Regarding the Location of Records Responsive to the Guidance FOIA Request

15. On February 28, 2019, the day the Department's summary judgment response-reply brief addressing the adequacy of the search for the Guidance FOIA was due, in the course of finalizing that brief, the final version of the appointment letter from former Attorney General Sessions to Mr. Huber was located, as an attachment to an email dated November 22, 2017 from then-Chief of Staff Whitaker to Mr. Huber.[4] That day, the Department's draft brief had been provided to Mr. Huber for review by the then-ODAG point of contact for FOIA matters. Upon reviewing the Department's draft brief that day, Mr. Huber brought to the attention of the then-ODAG point of contact that it appeared that drafters of the brief were not aware of the letter to him from Attorney General Sessions at the initiation of his assignment. The letter was delivered to Mr. Huber as an attachment in a November 22, 2017 email from then-Chief of Staff Whitaker. Mr. Huber also reported to the then-ODAG point of contact that he has maintained possession of the

[4] Chief of Staff Whitaker's email also attached the Department's November 13, 2017 response to Congressman Goodlatte which, as noted *supra*, is publicly available and attached to Plaintiff's FOIA request.

letter since receiving it. He then promptly forwarded this letter to the ODAG point of contact, who forwarded it to me. It was immediately apparent that this material was responsive to the Guidance Request, and I therefore immediately contacted Department's counsel of record to notify him of the discovery of this responsive material. Department counsel promptly notified Plaintiff that evening of the discovery of records responsive to its request and moved for an extension of time to determine whether additional responsive records existed. *See* ECF No. 22.

16. By letter dated March 8, 2019 OIP provided a supplemental response to Plaintiff's FOIA request disclosing the newly-located records, totaling six pages, in full. A copy of this supplemental response, dated March 8, 2019 is attached hereto as Exhibit B.

Steps Taken to Address the Location of Responsive Records

17. Recognizing that the existence of the November 22, 2017 Sessions letter raised questions about the adequacy of the initial "targeted inquiry" records search, I determined that the most appropriate response would be to conduct a complete electronic search for records responsive to Plaintiff's request, searching the emails of the senior leadership officials overseeing Mr. Huber's evaluation: former Attorney General Jeff Sessions, former Chief of Staff Matthew Whitaker, Deputy Attorney General Rod Rosenstein, and former Principal Associate Deputy Attorney General (PADAG) Robert Hur. These individuals had been identified by OAG and ODAG as having been involved in overseeing Mr. Huber's evaluation. This list of potential records custodians is also consistent with the November 22, 2107 letter and its transmittal email of that same date—i.e., Sessions, as the author of the letter, Whitaker, as the sender of the letter, and the Deputy Attorney General, who was designated to receive recommendations from Mr. Huber, as

appropriate. It also included one additional potential records custodian identified by ODAG—i.e., former PADAG Hur. Moreover, as an added precautionary measure in Plight of the circumstances, OIP also undertook search efforts with Mr. Huber's office directly.

18. Specifically, I determined that, in order to reasonably capture all potentially responsive records, searches would be conducted of unclassified email of the designated OAG and ODAG custodians, of the electronic database of the official records repository of OAG and ODAG, (Departmental Executive Secretariat (DES)),[5] as well as a manual search of Mr. Huber's electronic mailbox. As a result of these searches, OIP located only the appointment letter from Attorney General Sessions to Mr. Huber, as well as the email transmitting that letter and along with the November 13, 2017 Boyd letter. In other words, these searches located the same records that were discovered on February 28, 2019 and provided to Plaintiff on March 8, 2019, and no additional records. These searches are detailed below.

Search of OAG and ODAG Email

19. Unclassified email records are searched using a sophisticated electronic system which remotely searches through a given custodian's entire email collection to isolate and locate potentially responsive records within that collection of electronic records, using search parameters that are provided by OIP staff.[6] This same system then serves as the review platform by which OIP staff review the records retrieved using those initial search parameters. This platform allows broad search terms to be used initially and then for OIP

[5] The DES is also the official records repository of the OASG and OLA.
[6] For current and recently departed officials, as well officials who have changed components, this process remains the same—OIP identifies the relevant custodians and their entire email collection from their tenure in the leadership offices is remotely searched.

staff to run more targeted, secondary searches within the gathered universe to identify records responsive to each request. If and when secondary searches are conducted, the parameters used are based on a variety of factors, including keywords/search terms and contextual or background information provided in the request letter, topical research conducted on the request subject, discussions with knowledgeable officials within the Department, and OIP's review of the initial search results which allows OIP to identify common terms and phrasing that is actually employed by records custodians on the topic of the request. This two-tiered search approach leverages the technological advancements of the electronic search and review system and, by enabling a broad initial search followed by a focused secondary search, allows OIP staff to conduct thorough, precise, and informed searches of unclassified email systems.

20. In this instance, OIP undertook a search of the unclassified emails of former Attorney General Jeff Sessions, former OAG Chief of Staff Matthew Whitaker, Deputy Attorney General Rod Rosenstein, and former PADAG Robert Hur.[7] Moreover, OIP included in this email search Mr. Sessions's two personal assistants for the relevant time period, in consideration of the possibility that these assistants may have transmitted communications on his behalf. The timeframe of this search was from July 27, 2017 (the date of the first letter Congressman Goodlatte sent to Attorney General Sessions) to January 19, 2018, the date that OIP initiated its search efforts for Plaintiff's FOIA requests.[8] The search parameters used were for any reference to "Huber" in the "To," "From," "cc," or "bcc" email message fields. This is because the "Guidance FOIA"

[7] Based on the nature of Plaintiff's request, which seeks records of any guidance provided to Mr. Huber to evaluate the matters raised in the publicly available letters from Congressman Goodlatte, OIP reasonably limited its search to unclassified records.
[8] *See* 28 C.F.R. § 16.4(a).

sought "[a]ll guidance or directives provided to the 'senior federal prosecutors'" concerning the matters raised in Chairman Goodlatte's letters, and any guidance or directives provided to Mr. Huber via email would reasonably include Mr. Huber as a party to the communication.

21. The results of the above-described email searches were reviewed, item by item, to determine whether they contained any guidance or directives regarding Mr. Huber's appointment to evaluate the matters raised in Congressman Goodlatte's letters. Moreover, as is consistent with OIP's routine search procedures, the search results were also reviewed with an eye toward identifying any "leads" which would indicate other potential records custodians, but no such leads were identified.

Search of the Departmental Executive Secretariat

22. The DES is the official records repository of OAG and ODAG and maintains records of formal, controlled, unclassified correspondence sent to or from those Offices from January 1, 2001, to the present day. Moreover, the DES is used to track internal Department correspondence sent through formal channels, as well as certain external correspondence including Departmental correspondence with Congress. Records received by the designated senior leadership offices are entered into DES's Intranet Quorum (IQ) database by trained analysts. The data elements entered into the system include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. In addition, entries are made that, among other things, reflect what action is to be taken on the records, which component has responsibility for that action, and when that action should be completed. Keyword searches of the electronic IQ database may then be conducted by utilizing a

single search parameter or combinations of search parameters. Search parameters may include the subject, organization request, date, name, or other keywords.

23. OIP conducted a search for records in the electronic database of the DES using several combinations of search parameters: (1) correspondence where Mr. Huber was listed as "contact" (either sender or recipient); (2) correspondence where Attorney General Sessions was listed as a "contact" and contained the keyword "Huber," and (3) a general keyword search for correspondence containing the keywords "Sessions" and "Huber." The timeframe of this search was consistent with OIP's email searches—i.e. July 27, 2017 to January 19, 2018. The results of these searches were then reviewed, item by item, to see if they contained any guidance or directives regarding Mr. Huber's appointment to evaluate the matters raised in Congressman Goodlatte's letters.

24. OIP did not locate a copy of the finalized November 22, 2017 appointment letter in the DES. As a result, OIP reached out to the administrative staff in OAG to provide them a copy of the November 22, 2017 Sessions to Huber letter and to ascertain why the letter was not logged into the DES. OAG administrative staff advised OIP that they were not provided a copy of the final letter, and therefore the letter was not sent to Executive Secretariat staff to load into DES, as would happen in the usual course.

Manual Search of Mr. Huber's Electronic Mailbox

25. As stated previously, in this instance, OIP also determined it would be appropriate to request that a further search be done of Mr. Huber's electronic mailbox. To effectuate this search, OIP contacted Mr. Huber's office and requested that Mr. Huber's electronic mailbox be searched for any correspondence between Mr. Huber, former Attorney General Sessions, former OAG Chief of Staff Matt Whitaker, Deputy Attorney General

Rod Rosenstein, or former PADAG Robert Hur. The timeframe of this search was, again, July 27, 2017 through January 19, 2018. An official in Mr. Huber's office then searched the active archive of Mr. Huber's email account, consisting of the inbox, sent, and deleted items folders, for any messages that involved the officials identified above and then individually reviewed the results of these search efforts, including any attachments to emails or meeting invitations, to determine whether they contained records responsive to the Guidance Request. The list of items appearing in the search results of Mr. Huber's email account were sent to OIP, which then took the additional step of comparing, item by item, those results with the corresponding search conducted in OAG. Identifying no discrepancies between these two independent searches, OIP determined that a further item by item comparison between Mr. Huber's search results and the ODAG search results was unnecessary.

Summary and Adequacy of OIP's Records Searches

26. In total, as a result of its additional searches, OIP located six pages containing records responsive to Plaintiff's Guidance Request and which were provided to Plaintiff as part of OIP's March 8, 2019 supplemental response. Upon review of the email, DES, and Mr. Huber mailbox searches, OIP provided a final supplemental response to Plaintiff on April 4, 2019 confirming that no additional records responsive to its request were located other than those provided in the March 8, 2019 response. A copy of this final supplemental response, dated April 4, 2019 is attached hereto as Exhibit C.

27. Upon identification of records responsive to the Guidance Request, OIP took immediate actions to both inform Plaintiff of this fact and to determine whether any other potentially responsive records existed. OIP conducted supplemental searches for records relating to

any guidance provided to Mr. Huber as part of his appointment to evaluate the matters raised in the letters from Chairman Goodlatte. The timeframe of these supplemental searches were July 27, 2017 to January 19, 2018. These searches consisted of the unclassified email systems of the six officials in OAG and ODAG, as well as the electronic database of the DES, and a manual review of Mr. Huber's electronic mailbox.

28. I acknowledge that the initial records search that resulted in OIP's "no records" response to the Guidance Request was flawed, in that it did not result in the identification of the November 22, 2017 appointment letter from former Attorney General Sessions to Mr. Huber, or the email transmitting that letter to Mr. Huber by former Chief of Staff Whitaker. I identify two primary reasons for this: first, that the "targeted inquiry" search approach likely resulted in miscommunications within and between OAG and Mr. Huber which led Mr. Morrissey, and by extension me, to conclude that the November 22, 2017 appointment letter was drafted but never finalized, and second, that the final, signed November 22, 2017 appointment letter was not provided to administrative staff tasked with forwarding such correspondence to the DES. Had either of these two errors not occurred, the letter would have been located before OIP issued its final response to the Guidance Request. With respect to the miscommunication issue, I again note that the Boyd letter was identified at the time of the initial search and, while the November 22, 2017 appointment letter was unfortunately overlooked, that letter is considerably less substantive and thus it was likely not as prominent in the memories of relevant staff. With respect to the failure to provide the appointment letter to the DES, OIP has discussed this issue with OAG to emphasize the importance of ensuring that such correspondence is captured in the DES system, so it can be located by OIP staff pursuant

to FOIA searches. OIP also has confirmed that the November 22, 2017 letter has been provided to DES staff for inclusion in the DES.

29. Based on my experience with the Department, my familiarity with the records maintained by the leadership offices, discussions with knowledgeable staff, as well as my understanding of the scope of Plaintiff's request, and information gathered from the documents themselves, I aver that OIP's searches were reasonably calculated to uncover all potentially responsive records and that all files likely to contain relevant documents were searched.

I declare under penalty of perjury that the foregoing is true and correct.

Vanessa R. Brinkman
Senior Counsel
Office of Information Policy
U.S. Department of Justice

Executed this 26th day of April 2019.

EXHIBIT A

Whitaker, Matthew (OAG)

From:	Whitaker, Matthew (OAG)
Sent:	Wednesday, November 22, 2017 5:21 PM
To:	Huber, John (USAUT)
Subject:	Letter from Attorney General
Attachments:	11.22 Letter to Huber.pdf; ATT00001.htm; 2017-11-13 Special Counsel - Goodlatte #3912087.pdf; ATT00002.htm

As we discussed. MW

Office of the Attorney General
Washington, D. C. 20530

November 22, 2017

Hon. John W. Huber
United States Attorney for
The District of Utah
111 South Main Street
Suite 1800
Salt Lake City, UT 84111

Dear Mr. Huber:

In consultation with the Deputy Attorney General, I have requested that you review the matters referenced in the enclosed November 13, 2017, letter from Assistant Attorney General Stephen Boyd to House Judiciary Committee Chairman Robert Goodlatte and make recommendations to me or the Deputy Attorney General, as appropriate. Your review need not include matters that you determine are within the scope of the investigation being conducted by Special Counsel Robert Mueller.

Your recommendations should include whether any matters not currently under investigation warrants the opening of an investigation, whether any matters currently under investigation require further resources or further investigation, and whether any matters would merit the appointment of a Special Counsel.

Sincerely,

Jefferson B. Sessions III
Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

NOV 13 2017

Dear Chairman Goodlatte:

This responds to your letters dated July 27, 2017, and September 26, 2017, in which you and other Members request the appointment of a Special Counsel to investigate various matters, including the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters. We are sending identical responses to the other Members who joined your letter.

As noted during our prior meeting in response to your letters, the Department of Justice (Department) takes seriously its responsibility to provide timely and accurate information to Congress on issues of public interest, and seeks to do so in a non-political manner that is consistent with the Department's litigation, law enforcement, and national security responsibilities. Additionally, the Department's leadership has a duty to carefully evaluate the status of ongoing matters to ensure that justice is served and that the Department's communications with Congress are accurate and complete.

To further that goal, the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters. These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel. This will better enable the Attorney General and the Deputy Attorney General to more effectively evaluate and manage the caseload. In conducting this review, all allegations will be reviewed in light of the Principles of Federal Prosecution. (USAM 9-27.000)

As you know, consistent with longstanding policy, the Department does not ordinarily confirm or deny investigations, and this letter should not be construed to do so. While this policy can be frustrating, especially on matters of great public concern, it is necessary to ensure that the Department acts with fairness and thoughtfulness, and always in a manner consistent with the law and rules of the Department.

In addition, you must know the Department will never evaluate any matter except on the facts and the law. Professionalism, integrity, and public confidence in the Department's work is critical for us, and no priority is higher.

Your letter referenced various allegations related to the Federal Bureau of Investigation's (FBI) handling of the investigation into former Secretary of State Hillary Clinton's use of a personal email server. On January 12, 2017, the Department's Inspector General (IG) sent a letter to you and other Members advising that the IG's office was initiating a review of, among other things:

- Allegations that Department or FBI policies or procedures were not followed in connection with, or in actions leading up to or related to, the FBI Director's public announcement on July 5, 2016, and the Director's letters to Congress on October 28 and November 6, 2016, and that certain underlying investigative decisions were based on improper considerations;

- Allegations that the FBI Deputy Director should have been recused from participating in certain investigative matters;

- Allegations that Department and FBI employees improperly disclosed non-public information; and

- Allegations that decisions regarding the timing of the FBI's release of certain Freedom of Information Act documents on October 30 and November 1, 2016, and the use of a Twitter account to publicize the same, were influenced by improper considerations.

These investigations include issues raised in your letters. In addition, the Department has forwarded a copy of your letters to the IG so he can determine whether he should expand the scope of his investigation based on the information contained in those letters.

Once the IG's review is complete, the Department will assess what, if any, additional steps are necessary to address any issues identified by that review.

We will conduct this evaluation according to the highest standards of justice. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

EXHIBIT B

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

March 8, 2019

Mr. Austin R. Evers
American Oversight
1350 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: DOJ-2018-001098 (AG)
DOJ-2018-001147 (DAG)
18-cv-00319
VRB:TAZ:SJD

Dear Mr. Evers:

This is a supplemental response to your Freedom of Information Act (FOIA) request dated November 22, 2017, in which you requested various records pertaining to the Department's November 13, 2017 response to Rep. Robert Goodlatte's July 27, 2017 and September 26, 2017 letters, specifically, records reflecting guidance to prosecutors who have been directed to evaluate certain issues raised in Congressman Goodlatte's letters. This response is made on behalf of the Offices of the Attorney General (OAG) and Deputy Attorney General (ODAG).

We issued a response to you in this request (the "Guidance" request) and three related requests on July 16, 2018. Subsequently, we issued a supplemental response for these four requests on October 31, 2018, providing you with additional records located after re-running searches necessitated by the need to remedy a technical issue. Recently, we became aware of additional material responsive to the "Guidance" request that was not located in our previous searches, consisting of six pages.

I have determined that these six pages are appropriate for release in full, and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. IV 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michael Gerardi of the Department's Civil Division, Federal Programs Branch, at (202)-514-0680.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

EXHIBIT C

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

April 4, 2019

Austin R. Evers
American Oversight
1350 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: DOJ-2018-001098 (AG)
DOJ-2018-001147 (DAG)
18-cv-00319
VRB:TAZ:SJD

Dear Austin Evers:

This is a supplemental response to your Freedom of Information Act (FOIA) request dated November 22, 2017, in which you requested various records pertaining to Rep. Robert Goodlatte's July 27, 2017 and September 26, 2017 letters and the Department's November 13, 2017 response, specifically, records reflecting guidance to prosecutors who have been directed to evaluate certain issues raised in Congressman Goodlatte's letters. This response is made on behalf of the Offices of the Attorney General (OAG) and Deputy Attorney General (ODAG).

In an email dated March 4, 2019 from Department counsel, you were advised that the Department would conduct electronic searches of specified custodians for records responsive to the "Guidance FOIA." This search is now complete, and no additional records responsive to your request were located other than the records released to you in our response of March 8, 2019.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michael Gerardi of the Department's Civil Division, Federal Programs Branch, at (202)-514-0680.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:18-cv-00319

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS (ECF NO. 18-4)

1. Defendant does not dispute that Mr. Goodlatte and Mr. Gowdy sent a letter to Mr. Sessions and Mr. Rosenstein on March 6, 2018. Plaintiff's characterization of this letter does not require a response.

2. Defendant does not dispute that Mr. Grassley and other members of the U.S. Senate Committee on the Judiciary sent a letter to Mr. Sessions and Mr. Rosenstein on March 15, 2018. Plaintiff's characterization of this letter does not require a response.

3. Plaintiff's characterization of Exhibit 16 of the Cafasso Declaration does not require a response.

4. Defendant does not dispute that Mr. Sessions "asked United States Attorney John W. Huber to lead [the] effort" "to evaluate certain issues previously raised" by the House Judiciary Committee. Brinkmann Decl., Ex. A, Sessions March 29 Letter, at 3.

5. Defendant's characterization of Mr. Sessions's March 29 letter does not require a response.

6. Paragraph 6 states a legal conclusion that Defendant can neither admit nor deny.

7. Plaintiff's characterization of Exhibit 5 of the Cafasso Declaration does not require a

response.

8. Plaintiff's characterization of Exhibit 6 of the Cafasso Declaration does not require a response.

9. Plaintiff's characterization of Exhibits 7 and 8 of the Cafasso Declaration does not require a response.

10. Plaintiff's characterization of Exhibit 8 of the Cafasso Declaration does not require a response.

11. Plaintiff's characterization of Exhibit 9 of the Cafasso Declaration does not require a response.

12. Plaintiff's characterization of Exhibit 10 of the Cafasso Declaration does not require a response.

13. Plaintiff's characterization of Exhibit 11 of the Cafasso Declaration does not require a response.

14. Plaintiff's characterization of Exhibit 12 of the Cafasso Declaration does not require a response.

15. Plaintiff's characterization of Exhibits 13, 14, and 15 of the Cafasso Declaration does not require a response.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

No. 1:18-cv-00319

[PROPOSED] ORDER

Upon consideration of the Plaintiff's Motion for Discovery and a Stay of Summary Judgment Briefing, the Court hereby ORDERS that the motion is DENIED.

SO ORDERED.

Dated: _____, 2019

_____
CHRISTOPHER R. COOPER
United States District Judge